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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 984

CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,

Appellant,

vs.

WILLIAM F. McGLONE AND CONTINENTAL CASUALTY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION

WALTER W. BLOOD,
FRANK N. BANCROFT,
Counsel for Appellees.

BANCROFT, BLOOD & LAWS,
Of Counsel.

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SUPREME COURT OF THE STATE OF COLORADO

No. 15343

WILLIAM F. McGLONE AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,
Plaintiffs in Error,

vs.

CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,
Defendant in Error

Error to the District Court of the City and County of Denver

Honorable Henry A. Hicks, Judge

MOTION TO DISMISS APPEAL

The appellees, William F. McGlone and Continental Casualty Company, move to dismiss the appeal herein, for the following reasons, to-wit:

I

It does not appear that, in this cause in the Supreme Court of the State of Colorado, or in the District Court of the City and County of Denver, Colorado, there was

drawn in question the validity of any law or statute of the State of Colorado on the ground of its being repugnant to the Constitution of the United States.

II

It does not appear that, in this cause, the State of Colorado has deprived the City and County of Denver, appellant herein, of any property without due process of law; nor denied to it the equal protection of the laws.

III

That the only questions involved herein are questions local to Colorado, pertaining to its statutory and decisional law, in which no Federal questions have arisen; that the decision herein of the Supreme Court of the State of Colorado thereon is not without support; and that the said decision is binding upon, and should be followed by, all Federal Courts, including the Supreme Court, upon the questions of local law in the said State Court decided and determined.

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SUPREME COURT OF THE STATE OF COLORADO

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Plaintiffs in Error,

vs.

CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,

Defendant in Error

Error to the District Court of the City and County of Denver

Honorable Henry A. Hicks, Judge

STATEMENT OF APPELLEES SUPPORTING MOTION TO DISMISS APPEAL, AND MAKING AGAINST THE JURISDICTION ASSERTED BY APPELLANT.

I

Contentions of Appellees

The appellees contend, as stated in their Motion to Dismiss the Appeal, as follows:

(1) The appellant did not raise the question in the Courts in Colorado that the said State has, by any statute, deprived the appellant of its property.

(2) The State of Colorado, by the decision of its Supreme Court from which an appeal has been taken herein, did not take from appellant any of its property without due process of law; and in this respect the said decision is supported by the law of the State of Colorado, as well as of other jurisdictions.

(3) In this controversy, only questions of local substantive law were involved, and as to them the decision thereon of the Supreme Court of the State of Colorado, its highest appellate court, is binding upon and should be followed by all Federal Courts.

II

Statement of Case

The City and County of Denver, hereinafter called the "appellant" or the "City," sued McGlone and Continental Casualty Company, hereinafter called either the "appellees" collectively, or "McGlone" and the "Casualty Company" separately, on a statutory County Treasurer's Fidelity Bond given by McGlone as principal and the Casualty Company as surety. The bond was required from McGlone under Section 105, 1927 Edition (Section 57) of the Charter of the City and County of Denver, conditioned "as (required) by the General Statutes (of the State of Colorado) relating to bonds of *County* Treasurers" (see Charter provision in Exhibit C attached to appellant's statement). In addition thereto he had given a special bond as treasurer or custodian of the Water Works funds with reference to moneys in his possession belonging to the Board of Water Commissioners (of the City of Denver) upon which the Fidelity and Deposit Company of Maryland was the surety (the general bond is Exhibit A at R. fols. 227-231, and the special bond is Exhibit B at R. fols. 231-240).

The City and County of Denver is known in Colorado as a "Home Rule" City. Pursuant to a Colorado Constitutional Amendment, it has its own Charter under which it performs both County functions, as provided by the State laws, and purely local or City functions, both governmental and proprietary, as provided by its own Charter and Ordinances (see *Hilts* v. *Markey*, 52 Colo. 382, 387, 122 Pac. 54). Thus, its Manager of Revenue is Ex-officio, to answer the requirements of State law, the County Assessor and the County Treasurer (see Exhibit C attached to appellant's statement, Section 98, 1927 Edition of Charter (Section 4)). It was in this capacity that the bond herein sued upon was given. Also, the Manager of Revenue is Ex-officio the City Treasurer, and the Treasurer of the Board of Water Commissioners, as well as Treasurer of other Departments and Agencies of the City. It was as Treasurer of the Board of Water Commissioners that his special bond (Exhibit B referred to above) was given.

Under the Charter there was created a department or quasi-corporation known as the Board of Water Commissioners. This Board operates as a unit, agency or corporation carrying on the proprietary function of operating the City's Water Plant and of furnishing the City, its inhabitants and others with water at rates, charges or rentals fixed by the Board. It even charges the City for water furnished to the City, just as to any other user. It operates with great independence of the City. Just as in a Public Utilities Corporation, the members of the Board constitute its Board of Directors; it elects or appoints its own officers and agents, except that the City Treasurer is Ex-officio its Treasurer; and it has exclusive jurisdiction over the City's Water Works, property *and funds.* The only restraint as to the expenditure of its funds is that disbursements made must be upon warrants drawn by the Board and audited by the City Auditor, except that dis-

bursements made for the payment of principal and interest of Water Works Bonds need not be upon warrants so drawn or audited. The Board, through its own officers, may contract with reference to its own affairs, and such contracts need not be signed by the Mayor, like City contracts, as asserted by the appellant herein. It also may sue, in Water Works matters, though such suits must be brought in the name of the City by the City Attorney. This appeal is probably being so prosecuted, as the funds involved were the Board of Water Commissioners' funds. Except for the few limitations herein noted, the Board of Water Commissioners has all of the powers and attributes that a privately owned Public Utilities Corporation would have owning and operating Denver's Water Plant (see Exhibit 1 attached hereto, the same being a more complete quotation of Section 297B, of the 1927 Edition of the City's Charter (Section 264D) than that contained in Exhibit C attached to appellant's statement).

The City brought this action in its name for the Board of Water Commissioners against McGlone and his surety to recover on his bond given as *County* Treasurer (not upon his bond given as Treasurer of the Board of Water Commissioners) because some of the Board's funds which he had sent to Kountze Brothers, Bankers, in New York, to pay coupons payable there and maturing on Water Works Bonds, were lost through the failure and closing of the said Bank. The defense of McGlone and the Casualty Company was twofold. One was that liability, if any, was upon McGlone's special bond given as Treasurer of the Board of Water Commissioners, and not upon the bond sued upon in this case given by him as County Treasurer; and the other defense was that he sent the Board's funds, lost in this case, to Kountze Brothers, upon the direction and command of the Board, his superiors, who had the exclusive control and jurisdiction over such funds. The Colorado

Supreme Court decided the case for the appellees on the latter defense without mentioning the first, though the result upon the first, if decided, should have been the same. In the trial court, the District Court of the City and County of Denver, Colorado, appellant presented its case upon the doctrine or theory of "strict accountability" as evidenced by *Patterson* v. *People*, 98 Colo. 86, 53 Pac. (2d) 1187, and *People* v. *Koenig*, 99 Colo. 456, 63 Pac. (2d) 1235. At the time of the trial there had been no Colorado decisional exception to the rule announced in those two cases, though appellees contended that this cause was an exception to the said doctrine. Between the time of the trial and the determination of this case in the Colorado Supreme Court, that Court recognized and announced the exception, for which appellees had contended and were contending, in *McBride* v. *People*, 111 Colo. 577, 144 Pac. (2d) 777.

The trial was principally upon an agreed statement of facts. Appellant did not deny any of the facts presented by the statement. It admitted the truth of all thereof, but objected to certain portions as not being material or relevant and as being in part conclusions. These portions were admitted subject to appellant's objections (see R.—— fols. 250-262). Included in the portions so objected to were the letters which are Exhibits C, D and E (R. 63, 64 and 65, fols. 240, 241 and 242). Under Rule 43(c) of the Colorado Rules of Civil Procedure, which is identical with Rule 43(c) of the Federal Rules of Procedure, these three letters thus became part of the record of the cause for consideration by the Colorado Supreme Court. Notwithstanding this, appellant's counsel assert, in their statement herein, that the Justices of the Colorado Supreme Court who heard and determined this cause against the City *en banc*, without any dissent, did so "upon an issue that was not presented for decision"; and they make their assertions with unnecessary and unbecoming vituperation

and malignity, as we believe, against the Colorado Justices. We pass over counsel's slurs against the Colorado Supreme Court Justices as beneath our dignity to answer; and also because the Justices of the Colorado Supreme Court are above the requirement of defense.

Upon the offering of this evidence, the appellant's only objections were as above noted. It was contending for the strict accountability doctrine, without any exception, and so it did not then contend or object to this evidence on the ground, first asserted in this appeal, that the command or the direction of the Board of Water Commissioners to its Treasurer was an "order, law or statute" repugnant to the Constitution of the United States and particularly to Section 1 of Article XIV. In fact, the appellant never made any such contention either in the State District Court or in the State Supreme Court. It was disappointed when the State Supreme Court handed down its decision and opinion holding that this cause came within the exception for which the appellees contended and which was recognized in the said case of *McBride* v. *People (supra)*, but even then, in its Petition for a Rehearing, it did not contend or assert that the said direction or command was an "order, law or statute," by which the State deprived the appellant of property without due process of law. Specification numbered VII of its Petition for Rehearing is the only one attacking the constitutionality of the Colorado Supreme Court's decision. It does so upon these grounds, and upon these grounds only, summarized as follows: (a) that the decision was upon an issue not presented; (b) that any judgment entered on the opinion "would deprive the defendant in error (appellant herein) of its private contract, properties and rights"; and (c) any such judgment would "amount to a mere arbitrary and capricious exercise of power and would be in conflict with those fundamental principles which have

been established in our system of jurisprudence for the protection and enforcement of private rights." *Neither Colorado Court has ever had the opportunity of considering the command and direction of the Board of Water Commissioners to its Treasurer as possibly being a "statute," of the State, as now contended by appellant.*

Our grounds against jurisdiction are stated in our Motion to Dismiss the Appeal, and we present them in the order therein stated.

III

Argument

1. *In the State Court there was not drawn in question the validity of any statute of the State of Colorado.*

As shown above, the appellant did not, in either of the Colorado Courts, contend that the command or direction of the Board of Water Commissioners to its Treasurer was a "statute" within the meaning of that word as it is used in Section 237(a) of the Judicial Code (U. S. C. A., Title 28, Section 344(a)). Consequently, the Colorado Courts could not, and did not, hear or determine the specific question which the appellant is now attempting to raise as a Federal question.

We submit that this Court should refuse to consider an alleged Federal right which was not, by adequate specification, called to the attention of a State Court and considered by it. In this cause there must be, but there is not, some showing that the mind of the State Court was directed to and considered the command and direction of the Board of Water Commissioners to its Treasurer as possibly being a "statute" of the State of Colorado.

Henderson v. *State of Georgia*, 295 U. S. 441, 55 S. Ct. 794, 795;

Wilson v. *Cook, Commissioner*, Nos. 328-329, October Term, 1945 (Decided March 4, 1945).

Capital City Dairy Co. v. *State of Ohio*, 183 U. S. 238, 22 S. Ct. 120, 124;

Hardy v. *State of Illinois*, 196 U. S. 78, 25 S. Ct. 176.

In this respect, appellant has been unable and has failed to comply with Subdivision 1 of Rule 12 of the Rules of this Court, providing—

> "• • • The statement shall refer distinctly to the statutory provision believed to sustain jurisdiction, (b) to the statute of the State • • • the validity of which is involved (giving the Volume and page where the statute may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions • • •."

In any event, the said direction or command was not a "statue." It did not directly affect any part of the public to whom the Board offers water service, or with whom it deals, as a city department, agency or corporation. It was simply an administrative matter within the workings of the Board itself. Otherwise, every direction or order of a superior officer or employee of the Board to an inferior employee, such as a clerk, secretary or stenographer, to write a check, to write a letter or to do anything at all, might be considered a "statute." The word "statute" in Section 237 (a) of the Judicial Code is used in the sense of a legislative enactment, whether by a State Legislature or some lesser body, acting on behalf of the State in a delegated legislative capacity. It has been defined as a "legislative act in character, to which the State gives sanction." It is confined to "a (State) Constitution, an Act of the Legislature, or an Act of a subordinate instrumentality of the

State exercising delegated legislative authority, like an ordinance or an order of a Commission."

Hamilton v. *Regents of the University of California*, 293 U. S. 245, 55 S. Ct. 197.

Standard Computing Scale Co. v. *Farrell*, 249 U. S. 251, 39 S. Ct. 380;

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20, 28 S. Ct. 7;

John P. King Mfg. Co. v. *City Council of Augusta*, 277 U. S. 100, 48 S. Ct. 489.

The record herein is wholly devoid of any showing that, as specified in appellant's assignments of error, the decision of the Colorado Supreme Court was a suit "where is drawn in question the validity of any statute on the ground of its being repugnant to the Constitution."

2. *No showing that the State has deprived appellant of any property without due process of law.*

Appellant contends in its fifth, sixth and seventh assignments of error that the State has deprived it of property without due process of law contrary to Section 1 of Article XIV of the Constitution, for the alleged reason only that its Supreme Court erroneously decided this cause without reference to any Federal constitutional question. In this respect, it attempts to contend, but without avail, that the Colorado Supreme Court did not decide this case upon the law or the record before it. In this respect also it contends that the Colorado Supreme Court did not give proper heed to Section 106 (1927 Edition) of the Denver City Charter. Specification 1 of Petition for Rehearing), providing for the selection of banks in Denver for the deposit accounts of "City and County Funds," but not Water Works funds. Exhibit C, attached to appellant's statement on jurisdic-

tion). Appellant parenthetically states in its said Petition for Rehearing that the Court takes judicial notice of this Charter provision. This statement is erroneous. The law is that Colorado Courts do not take judicial notice of town or city ordinances and charters and they must be pleaded and proven (see *Fay* v. *Fort Collins*, 40 Colo. 262, 90 Pac. 912, and cases there cited). We mention this because much of appellant's statement on jurisdiction is premised upon this Charter Section being in the record and the Court's violation of it.

The City neither pleaded nor proved this Section in the District Court and it is not in the agreed statement of facts. Neither did the City offer this Charter Section in evidence. Consequently, it is not in the record of the State District Court. Quoting it in the Petition for Rehearing does not insert it in the record, upon which the Colorado Supreme Court determined this cause, and it is now improper to argue that the Colorado Supreme Court violated the appellant's rights by ignoring it.

This incident also illustrates that the appellant is aggrieved because the Colorado Supreme Court decided this cause upon the record before it, following the decisional law which it believed to be the better rule in Colorado, as well as elsewhere. Its opinion shows that it considered *Patterson* v. *People*, 98 Colo. 86, 53 Pac. (2d) 1187, and *People* v. *Koenig*, 99 Colo. 456, 63 Pac. (2d) 1235, the then two most recent Colorado cases on the rule of strict accountability, and then concluded that this cause was within the exception recognized and announced in *McBride* v. *People*, 111 Colo. 577, 144 Pac. (2d) 777. It also shows that the Court considered decisions from other jurisdictions and the three Federal cases decided in the *McBride* case (*City of Scranton* v. *Aetna Casualty & Surety Co.*, 11 Fed. Supp. 986, 22 Fed. Supp. 249, 94 Fed. (2d) 941, *Howard* v. *United States*, 87 Fed. (2d) 243, 248, and *American Surety*

Co. v. *City of Thomasville*, 73 Fed. (2d) 584). It is unnecessary to argue now that the Court's decision follows the better rule. It was, when this cause was decided in the Colorado Supreme Court, and is now the decisional rule in Colorado, arrived at after due and deliberate consideration; and in this cause is controlling on this Court, even though this Court might itself prefer some other rule.

When the Colorado Supreme Court denied appellant's Petition for Rehearing, there was no evasion of any Federal constitutional question. None had been properly presented. We believe, therefore, that jurisdiction of this Court is lacking, based upon the following quoted from *Broad River Power Co.* v. *State of South Carolina*, 281 U. S. 537, 540, 50 S. Ct. 401, 402:

> "But if there is no evasion (by the State Court) of the constitutional issue (citing cases) and the non-federal ground of decision has fair support (citing cases), this Court will not inquire whether the rule applied by the State Court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the State Court."

The above is approved and quoted in *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 64 S. Ct. 384.

Other cases, of the same purport, and holding that this Court does not have "any power to correct any supposed errors of the State Court in the determination of State law," are:

Sauer v. *City of New York*, 206 U. S. 536, 27 S. Ct. 686, 689;

Leathe v. *Thomas*, 207 U. S. 93, 28 S. Ct. 30;

Vandalia Railroad Co. v. *State of Indiana*, 207 U. S. 359, 28 S. Ct. 130, 132;

Enterprise Irrigation District v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 37 S. Ct. 318, 320;

Fox River Paper Co. v. *Railroad Commission*, 274 U. S. 651, 47 S. Ct. 669, 671.

3. *The State Court's decision on purely local law is controlling upon the Federal Courts.*

The question involved being liability of a Colorado public official upon his Fidelity Bond, given pursuant to Denver's Charter provisions, it involved only local law. In determining it the Colorado Supreme Court followed the Colorado decisional law as announced in the *McBride* case and felt controlled by it. The said decisional law is equally controlling upon the Federal Courts in this controversy whether or not it be the better rule.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817;
Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860;
Guaranty Trust Co. v. *York*, 326 U. S. 99, 65 S. Ct. 1464;
West v. *A. T. & T. Co.*, 311 U. S. 223, 61 S. Ct. 179.

Conclusion

Believing that there is no jurisdictional ground or Federal question present upon which this appeal might be prosecuted, we respectfully submit that it should be dismissed.

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EXHIBIT 1

SECTION 297B OF THE 1927 EDITION OF THE CHARTER OF THE CITY AND COUNTY OF DENVER, COLORADO.

"Section 264D. There shall be and hereby is created a non-political Board of Water Commissioners of five members, to have complete charge and control of a water works system and plant for supplying the City and County of Denver and its inhabitants with water for all uses and purposes. • • •

• • • The Board shall have and exercise all the powers of the City and County granted by the constitution and laws of the State of Colorado and by the Charter, in the matter of purchasing, condemning and purchasing, acquiring, constructing, leasing, extending and adding to, maintaining, conducting and operating a water works system and plant for all uses and purposes, and everything necessary, pertaining, or incidental thereto. It may temporarily lease water and water rights to be used outside of the limits of the City and County of Denver when the water supply for the City and County of Denver and its inhabitants is above that necessary for its present needs; said leases, however, to be for periods not exceeding one year and to be made subject to the future needs and requirements of the City and County and its inhabitants. It shall have power in the name of the City and County of Denver to make and execute contracts necessary or incidental to the powers herein granted; and shall also in the name of the City and County of Denver institute and defend all litigation affecting its powers and duties or in relation to said water works system and plant and the property and rights connected therewith or incidental thereto.

Said Board shall have power to employ a secretary, manager, and such skilled and technical help as it may deem necessary, to serve during the pleasure of the Board, and to fix their compensation; provided it shall be the duty of the attorney for said City and County to render all legal services required by the Board. And the Board shall hire

and dismiss all other employees, subject to the right of the Civil Service Commission to examine such employees so appointed (except laborers) as to their qualifications to perform the duties for which they are appointed, and whenever such appointee is found incompetent by said Civil Service Commission such appointment shall thereafter be void; and the Board shall subject to the provisions of the Charter fix the compensation of such other employees. It shall fix the rates for which water shall be furnished for all purposes, and shall provide rules and regulations relative to the use and distribution thereof. All water rates shall be uniform as far as practicable, and as low as good service will permit, and after the bonded indebtedness is paid shall be no more than necessary to cover the cost of operation, maintenance, additions, extensions and betterments. The Board shall provide for the payment of water rates in advance, at least twice yearly, and shall provide penalties for failure to pay promptly and for non-payment.

The City and County of Denver shall annually pay into the Water Works Fund for all water supplied it for all public purposes, and the rates for the use of such water by the City and County shall not exceed the rates which were charged the City and County of Denver for said purposes by the Denver Union Water Company for the years 1917 and 1918; provided, that the City and County of Denver shall not be required to pay for water furnished it by the City Ditch for the irrigation of parks and parkways and the filling of reservoirs.

The entire cost of the operation and maintenance of said water works system and plant, including the salaries of the Board and its employees, and for additions, extensions and betterments, shall be paid from the Water Works Fund. No indebtedness created by the Board in any year shall be a charge against the revenues for any succeeding year. No money shall be expended from the revenues of said plant for additions, extensions and betterments in any year until the expense of maintenance and operation and interest on the bonds for the current year have been provided for. The board shall make an itemized monthly statement of all moneys received and paid out by it and all indebtedness incurred, a copy of which it shall file with the Auditor of the

City and County of Denver, and shall daily turn over to the Treasurer of said City and County all money received.

The Treasurer of the City and County of Denver shall open and keep a separate account for said Water Works Fund into which shall be placed all revenues received from the operation of the Water Works system and plant together with all moneys coming into said fund from other sources, and enter therein all receipts and disbursements on account thereof, and moneys shall be paid out of said fund only upon the warrants of the Board, audited by the Auditor of the City and County of Denver, except as to the bonds and the interest thereon which the Treasurer shall pay without such warrant or audit. The moneys in said Water Works Fund shall not be used other than for the management, operation and maintenance of said Water Works system and plant, including additions, extensions and betterments and for the payment into the sinking fund for the payment of interest on and the payment and redemption of the bonds, for the acquisition of a Water Works system and plant, when issued. The Treasurer shall give such additional bond conditioned in such manner as shall be determined by the Board, the premium therefor to be paid out of the Water Works Fund. The sureties on all official bonds to be given by the Board, its appointees and the Treasurer shall be responsible surety companies.

* * * * * * *

The Board shall have power to adopt rules governing its organization, the calling of special meetings and the conduct of its business. A majority of the Board shall constitute a quorum, and all action by the Board shall be taken by a majority of the Board and not otherwise.

Any and all parts of the Charter in conflict herewith are hereby repealed.